Issues: Qualification – Retaliation (other protected right) and Work Conditions (hours of work, shift); Ruling Date: March 21, 2013; Ruling No. 2013-3526, 2013-3527; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3526, 3527
March 21, 2013

The grievant has requested a ruling on whether her August 9, 2012 and August 13, 2012 grievances with the Department of Juvenile Justice (DJJ or the agency) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

In the grievant's August 9, 2012 grievance, the grievant asserts various violations of laws, regulations, and policies by the agency. In the August 13, 2012 grievance, the grievant challenges the requirement that education staff follow a particular institutional policy regarding tardiness. The grievances proceeded through the management resolution steps and the grievant now requests qualification for a hearing.[1]

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment

[1] Additional facts that are pertinent to each grievance will be included in the Discussion section below.
[2] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[3] *See* Va. Code § 2.2-3004(B).
[4] *See Grievance Procedure Manual* § 4.1(b).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

August 9, 2012 Grievance

In reviewing the Grievance Form A, while the grievant has listed numerous statements that the agency has violated or misapplied certain laws, regulations, and/or policies, there are few, if any, indications of what specific acts by management have violated or misapplied these provisions and how the acts have adversely impacted the grievant's employment.[7] Additional information was sought from the grievant during EDR's investigation for this ruling. However, no further detail to substantiate or elucidate the grievant's claims was provided. As such, the claims without such details do not raise a sufficient question of any of the theories noted above or that an adverse employment action has occurred to qualify for a hearing.

The only allegations on the Grievance Form A with enough detail to at least evaluate are 1) alteration of work schedule of the entire division of education (shortening lunches, cancelling certain schedules and work days, etc.), and 2) requiring exempt employees to sign-in and sign-out. There is no indication that requiring sign-in and sign-out by exempt employees was an adverse employment action or that such a requirement violated any law, regulation, or policy. As such, the claim does not qualify for a hearing. As to the alteration of work schedule claim, the grievant asserts that the agency's actions were retaliatory.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;[9] in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's

[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] For example, the grievant asserts that the agency has not granted compensatory time approved by supervisors and that the agency has violated laws and regulations pertaining to deductions from employee compensation. Whether these claims are valid cannot be assessed because the grievant has provided no detail about any compensatory time she is allegedly due or what allegedly improper deductions have been made from her compensation.
[8] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).
[9] As noted in EDR Ruling Nos. 2013-3446, 2013-3447, although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).

stated reason was a mere pretext or excuse for retaliation.[10] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[11]

Even if it is assumed that the schedule changes amounted to an adverse employment action, there is no indication that these changes were retaliatory. The grievant asserts that by making these changes the agency is retaliating against an entire division, including the grievant. However, beyond the grievant's allegation that the changes were retaliatory, there has been nothing presented to substantiate the claim. Although the grievant may disagree with these changes, EDR has reviewed nothing that would indicate that the agency acted with any retaliatory intent as to the entire division in making these modifications. Therefore, the claim does not qualify for a hearing.

August 13, 2013 Grievance

The grievant's claim in this grievance appears to be the agency's implementation of an institutional policy regarding tardiness with new application to education staff, including the grievant. However, the grievant has not alleged any facts as to how this policy has been applied to the grievant resulting in any adverse employment action. Consequently, the grievant's claims appear to be solely challenging the content of a personnel policy or rule, which is an action that does not qualify for a hearing.[12]

The grievant's August 9, 2012 and August 13, 2012 grievances do not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[13]

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[10] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[11] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[12] *Grievance Procedure Manual* § 4.1(c).
[13] Va. Code § 2.2-1202.1(5).